No. 84-435

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT RUSSELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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26PP

QUESTIONS PRESENTED

1. Whether the holding by the Seventh Circuit—that residential property* is encompassed within 18 U.S.C. 844(i)—conflicts with the Second Circuit's unequivocal position that it is not within the statute.†

2. Whether residential property falls within the ambit of 18 U.S.C. 844(i).

3. Whether the use of interstate gas to heat the building is ground, nonetheless, for invoking federal jurisdiction.

PARTIES INVOLVED [per Rule 21.1(b)]

Petitioner, Robert Russell, was the defendant in the District Court for the Northern District of Illinois, Eastern Division, and appellant in the Court of Appeals for the Seventh Circuit. Respondent, United States of America, was plaintiff in the District Court, and appellee in the Court of Appeals.

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* Per undisputed facts, (see Stip., R. 30, p. 1), the property here in issue was a two-flat residential building; at the time in question, the ground floor was vacant, and a single family rented the second floor. (Tr. 98-100, 104-05)

† *United States* v. *Mennuti*, 639 F.2d 107 (2 Cir. 1981); *accord*, *United States* v. *Barton*, 647 F.2d 224, 232 & 232 n.8 (2 Cir. 1981), distinguishing and adhering to *Mennuti*.

Also in harmony with the Second Circuit is the Tenth; see *United States* v. *Monholland*, 607 F.2d 1311 (10 Cir. 1979).

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Parties Involved	i
Judgment, Opinion and Order Below	1
Jurisdictional Statement	2
Statutes Involved	2
Statement of the Case	2
Nature of the Case	2
Jurisdiction of Trial Court	3
Statement of Facts	3
Reasons for Granting the Writ	4
The decision below—that residential property is encompassed within 18 U.S.C. 844(i)—conflicts with the Second Circuit's unequivocal position [as stated in *United States* v. *Mennuti*, 639 F.2d 107, adhered to in *United States* v. *Barton*, 647 F.2d 224] that such property is not within the statute	4
The Seventh Circuit impermissibly has extended the statute beyond its intended scope, and erroneously and illogically purports to distinguish *Mennuti*—which is functionally indistinguishable from this case	4
Nor can the decision be justified on grounds that interstate gas was used to heat the building—a ground expressly rejected in *Mennuti*	4
Certiorari should be allowed to permit this Court to interpret the scope of the statute and to resolve a direct conflict amongst the Circuits	4
Conclusion	12

Appendices:

PAGE

A. Opinion of the United States Court of Appeals for the Seventh Circuit, dated June 27, 1984, No. 83-2580 ..... App. 1

B. Order amending opinion and denying Petition for Rehearing, dated July 25, 1984 ..... App. 5

TABLE OF AUTHORITIES

Cases

PAGE

United States v. Andrini, 685 F.2d 1094 (9 Cir. 1982) 6, 9

United States v. Barton, 647 F.2d 224 (2 Cir. 1981) 4, 6, 7, 8, 11

United States v. Belcher, 577 F.Supp. 1241 (E.D. Va. 1983) 6, 7

United States v. Corbo, 555 F.2d 1279 (5 Cir. 1977) 6

United States v. Fears, 450 F.Supp. 249 (E.D. Tenn. 1978) 6

United States v. Giordano, 693 F.2d 245 (2 Cir. 1982) 9, 11

United States v. Keen, 508 F.2d 986 (9 Cir. 1974) 6

United States v. Mennuti, 639 F.2d 107 (2 Cir. 1981) 4, 5, 6, 8, 10, 11

United States v. Monholland, 607 F.2d 1311 (10 Cir. 1979) 4, 5, 6

United States v. Nashawaty, 571 F.2d 71 (1 Cir. 1978) 6

United States v. Russell, 563 F.Supp. 1085 (N.D. Ill. 1983) 1, 4, 8, 10

United States v. Schwanke, 598 F.2d 575 (10 Cir. 1979) 6

United States v. Sweet, 548 F.2d 198 (7 Cir. 1977) 6

Statutes

PAGE

18 U.S.C. 844(e) 6

18 U.S.C. 844(i) ..... *passim*

18 U.S.C. 3231 3

28 U.S.C. 1254(1) 2

Other Authority

House Report No. 91-1549, [1970] U.S. Code Cong & Adm News 4007, at 4046, Organized Crime Control Act of 1970 ..... 6, 7, 11

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Robert Russell (hereafter, defendant), prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, affirming his conviction and sentence for attempted arson in violation of 18 U.S.C. 844(i).

Judgment, Opinion and Order Below

The Opinion of the Court of Appeals for the Seventh Circuit, No. 83-2580, not yet published, is set out as Appendix A.

The Memorandum Order of the District Court for the Northern District of Illinois, Eastern Division, No. 83 CR 114, is reported: *United States* v. *Russell*, 586 F.Supp. 1085 (N.D.Ill. 1983).

Jurisdictional Statement

On June 27, 1984, the Court of Appeals for the Seventh Circuit filed its Opinion herein. (App. A) Defendant's timely Petition for Rehearing was denied, with original opinion amended, on July 25, 1984. (App. B) This petition to review the judgment of a federal court of appeals is timely filed within 60 days after denial of petition for rehearing. Jurisdiction is invoked under 28 U.S.C. 1254(1) and Rules 20.1 and 20.4 of this Court.

Statute Involved

18 U.S.C. 844(i) provides, in pertinent part:

> "Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; . . ."

STATEMENT OF THE CASE

Nature of the Case

Defendant was charged (R. 8)[1] with having attempted to damage and destroy a two-unit apartment building in Chicago, Illinois which was used in an activity affecting interstate commerce, by means of fire and explosive, in violation of 18 U.S.C. 844(i).

Defendant's pre-trial motion to dismiss the indictment on grounds the statute does not apply to residential buildings, (R. 17), was denied. (R. 20, 23) At the close of all the evidence, the court denied defendant's motion for judgment of acquittal. (R. 34)

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[1] Hereafter: "R." refers to the Record on Appeal, and "Tr." to the Transcript of Proceedings.

The court found defendant guilty as charged, (R. 34) and sentenced him to 10 years. (R. 35) The Court of Appeals for the Seventh Circuit affirmed, (App. A), and although defendant's timely petition for rehearing was denied, the opinion was amended. (App. B)

Jurisdiction of Trial Court [per Rule 21.1(i)]

Jurisdiction in the court of first instance is based upon 18 U.S.C. 3231, which provides in part that "The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." Defendant was charged with having committed an offense against a law of the United States, to wit, 18 U.S.C. 844(i).

Statement of Facts

Evidence pertaining to the attempt itself—not relevant to the issues of the statute's scope and/or the District Court's jurisdiction—is omitted in the interest of brevity.[2]

Per the undisputed facts, (Stip., R. 30, p. 1), the property was a two-flat building; at the pertinent time, the ground floor was vacant, and a single family occupied the second floor, renting from the owner (defendant). (Tr. 98-100. 104-05) Natural gas [arguably] originating outside Illinois was used to heat the second floor apartment. (Tr. 119)

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[2] In the District Court, and on appeal—but not in this Court—defendant contended the evidence was insufficient to establish the offense, because (a) no "attempt" had been proven as to him and/or his alleged agent-accessory, (see App. A, pp. 3-4), and (b) the proof was deficient that the natural gas used to heat the premises was in interstate commerce. (See Tr. 121-34)

REASONS FOR GRANTING THE WRIT

The decision below—that residential property is encompased within 18 U.S.C. 844(i)—conflicts with the Second Circuit's unequivocal position [as stated in United States v. Mennuti, 639 F.2d 107 (2 Cir. 1981)],[3] adhered to in United States v. Barton, 647 F.2d 224, 232 (2 Cir. 1981), that such property is not within the statute.

The Seventh Circuit impermissibly has extended the statute beyond its intended scope, and erroneously and illogically purports to distinguish Mennuti—which is functionally indistinguishable from this case.

Nor can the decision be justified on grounds that interstate gas was used to heat the building—a ground expressly rejected in Mennuti.

Certiorari should be allowed to permit this Court to interpret the scope of the statute and to resolve a direct conflict amongst the Circuits.

• • •

Synopsis of Argument

Residential property does not fall within the ambit of the statute. The Seventh Circuit's decision to the contrary conflicts with decisions from two sister Circuits.

Use of interstate fuel does not bring non-commercial, residential property within the statute's scope. Not

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[3] In harmony with *Mennuti*, and thereby also conflicting with the instant decision, is the Tenth Circuit in *United States* v. *Monholland*, 607 F.2d 1311 (10 Cir. 1979). *Mennuti* squarely conflicts with the instant case, for both *Mennuti* and *Russell* involved purely residential property, while *Monholland*, which involved personal property (a truck), inferentially conflicts with *Russell*.

only must the property be "used" in interstate commerce"; it must be commercial property.

The property here was not commercial property.

This case is functionally indistinguishable from *Mennuti, supra.*

Congressional intent.

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Residential Property Does Not Fall Within the Ambit of the Statute. The Seventh Circuit's Decision To The Contrary Conflicts With Decisions From Two Sister Circuits.

Per the undisputed facts, (Stip., R. 30, p. 1), the property in issue was a two-flat building; at the time in question, the ground floor was vacant and a single family rented the second floor. (Tr. 98-100, 104-05) The District Court's determination[4] that federal jurisdiction nonetheless exists (R. 20, 34), affirmed on appeal, (App. A), conflicts with decisions from two different Circuits—the Second and Tenth. *United States* v. *Mennuti,* 639 F.2d 107 (2 Cir. 1981); *United States* v. *Monholland,* 607 F.2d 1311 (10 Cir. 1979) (See fn. 3, *supra.*)

Directly on point, *Mennuti* affirmed the District Court's dismissal of the indictment under sec. 844(i) where, as here, the alleged target of the explosives was a residential, not a commercial, building. Similarly, *Monholland, supra,* held that the statute does not apply to destruction of a truck used by a State judge travelling to and from work, though the truck used fuel from interstate commerce, was insured by an interstate company, etc.

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[4] The District Court twice ruled on this issue—first in denying defendant's pre-trial motion to dismiss, (R. 17 [motion]; R. 20, 23 [denial]—opinion printed at 563 F.Supp. 1085 (N.D. Ill. 1983), and again in denying the motion for acquittal at the close of all the evidence. (R. 34)

All those cases finding the statute applicable—without exception—involved commercial property.[5] No case was discovered wherein purely residential property—as here—was deemed subject to the statute.[6]

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[5] In *United States* v. *Barton*, 647 F.2d 224, 232 & 232 n.8 (2 Cir. 1981) (gambling operations), and *United States* v. *Giordano*, 693 F.2d 245, 250 (2 Cir. 1982) (piano store), the Court distinguished and adhered to its prior *Mennuti* holding. In *United States* v. *Andrini*, 685 F.2d 1094, 1096 (9 Cir. 1982), the Court listed *Mennuti* and *Monholland*, *supra*, as the only cases wherein Circuit Courts have not found §844(i) jurisdiction, "neither of which involved *commercial* property." (Emphasis in original.) The property held subject to the statute in *Andrini* was a commercial building under construction. See, *e.g.*, *United States* v. *Nashawaty*, 571 F.2d 71 (1 Cir. 1978) (paint shop); *United States* v. *Sweet*, 548 F.2d 198, 202 (7 Cir. 1977) (tavern); *United States* v. *Schwanke*, 598 F.2d 575, 578 (10 Cir. 1979) (cafe); *United States* v. *Corbo*, 555 F.2d 1279, 1282 (5 Cir. 1977) (bookstore); *United States* v. *Keen*, 508 F.2d 986, 990 (9 Cir. 1974) (commercial fishing boat); *United States* v. *Belcher*, 577 F.Supp. 1241, 1242-44 (E.D. Va. 1983) (restaurant).

[6] *United States* v. *Fears*, 450 F.Supp. 249 (E.D. Tenn. 1978), relied on by the District Court, (R. 20, p. 5), did not involve sec. 844(i), but, rather, sec. 844(e), which prohibits *use of the telephone* to threaten to damage or destroy "any building" by explosives. Sec. 844(e)'s specification of "use of the . . . telephone . . . or other instrument of commerce" thus provides the interstate nexus via the means of conveying a threat or false information *re* harm to any individual or building; see 450 F.Supp. at 252, quoting from sec. 844(e). Thus, the *Fears* court's decision that sec. 844(e) includes residential property within the phrase "any building" is not determinative with respect to sec. 844(i)—the statute here in issue—which does not involve interstate commerce by virtue of use of a "telephone . . . or other instrument of commerce."

Moreover, the legislative history of sec. 844(e) does not include any indication that Congress did not intend "any building" to mean, literally, *any* building, see 450 F.Supp. at 253, whereas the history of sec. 844(i) *does* contain material limiting the applicability of sec. 844(i) to *business* (as opposed to residential) property. *Mennuti*, *supra*, 639 F.2d at 111-12, quoting from House Report No. 91-1549.

Use of interstate fuel does not bring non-commercial, residential property within the statute's scope. Not only must the property be "used in interstate commerce"; it must be commercial property.

In describing the property covered by 18 U.S.C. 844(i), the Congressional committee used these words:

> ". . . business property used in . . . commerce or in an activity affecting . . . commerce, not . . . dwelling houses which were not being used for any commercial purpose at all." *Mennuti, supra,* 639 F.2d at 111-12, quoting from House Report No. 91-1549, [1970] U.S. Code Cong & Adm News 4007, at 4046, Organized Crime Control Act of 1970.

It is not enough that there is some federal connection such as use of fuel in interstate commerce; the property must be business, not residential, property for the statute to apply. Examination of cases construing the statute demonstrate that on the facts, courts apply a two-pronged test: is the building a commercial building, and is it used in (or in an activity affecting) commerce? Both these elements must exist on the facts to establish violation of the statute.

For example, in *United States* v. *Belcher,* 577 F.Supp. 1241 (E.D. Va. 1983), the District Court found federal jurisdiction under 18 U.S.C. 844(i) where the building was "a commercial building wherein out-of-State goods were sold . . ." *Id.* at 1245. The Court held:

> "violation of § 844(i) minimally requires destruction *of a commercial building* wherein a business buys and sells goods passing in interstate commerce." *Ibid.* (Emphasis added.))

In *Barton, supra,* the Court found that consumption in the building of coffee and orange juice from out-of-State, *and* use of out-of-State fuel in heating the building, constituted "alternative jurisdictional predicates." 647 F.2d at 232-33.

Never before has the mere use of interstate fuel been the basis—as here—for finding federal jurisdiction in a residential, not a commercial, building.

In *Mennuti* itself, *supra,* 639 F.2d at 110, the Court expressly rejected the position adopted by the District Court herein, (see *United States* v. *Russell,* 563 F.Supp. 1085, 1086 (N.D. Ill. 1983)), adhered to by the Seventh Circuit. (App. A. p. 2.) There, in response to the government's offer of proof—which included that "telephone lines, electric lines, and other services provided at . . . [the residence] traveled in interstate commerce and affected interstate commerce," 639 F.2d at 108-09, n.1, par. 5—the Second Circuit flatly rejected the argument that such proof establishes jurisdiction:

> "[A] residence is not used in interstate or foreign commerce simply because . . . it received electric power and telephone service from companies engaging in or affecting commerce . . ." *Id.* at 110.

Similarly, analyzing *Mennuti,* the Second Circuit in *Barton, supra,* noted that the statute "does not apply to private dwellings, notwithstanding several interstate contacts involving . . . fueling." 647 F.2d at 232 n.8. See also *Monholland, supra.*

Several Second Circuit cases decided subsequent to *Mennuti* expressly have reaffirmed that decision, finding federal jurisdiction on their respective facts where *commercial* property was involved. In *United States* v. *Barton, supra,* decided a few months after *Mennuti,* the reviewing court found that the buildings in question (which housed gambling operations):

> ". . . were used in activities affecting interstate commerce within the meaning of §844(i). There was ample evidence that *the buildings were used for commercial activities.*" 647 F.2d at 232. (Emphasis added).

The Court noted:

> "This [*i.e.*, that the buildings were used for commercial activities] distinguishes our recent decision in . . . [*Mennuti*], in which we held that §844(i) does not apply to private dwellings, notwithstanding several interstate contacts involving financing, insurance, fueling, and use of building materials." *Id.* at 232 n.8.

And in *United States* v. *Giordano*, 693 F.2d 245 (2 Cir. 1982), the Court held a piano store fell within the ambit of the statute. Specifically holding that this decision was consistent with *Mennuti*, the Court stated:

> "*Mennuti* held that only commercial enterprises are covered by the statute; there is no claim here [*i.e.*, in *Giordano*] that defendants conspired to destroy a residential building, as in *Mennuti*." 693 F.2d at 250.

In *United States* v. *Andrini*, 685 F.2d 1094 (9 Cir. 1982), the property held to be subject to the statute was a commercial building under construction. In the course of its opinion, the Court stated:

> "We have discovered only two cases in which circuit courts have not found §844(i) jurisdiction, neither of which involved *commercial* property." [Citing *Mennuti* and *Monholland, supra.*] *Id.* at 1096. (Emphasis in original.)

Each of the cases finding federal jurisdiction under the statute involves property which was used commercially. See cases cited in fn. 5, *supra*.

The Property Here Was Not Commercial Property.

The Seventh Circuit's position, (App. A, p. 3), adopting that of the District Court, (R. 20, pp. 1-2), characterizing the property as business or commercial property because defendant treated it as income property, confuses the quality of the property with the characterization of defendant. No authority has been advanced in support of this novel

position, that the manner in which a person treats property—despite the objective facts—can bring federal jurisdiction into play. Defendant's conviction should not be permitted to stand on the basis of unfounded theory. Considering the objective facts, the property here was purely residential. As such, it is not covered by the statute.

This Case is Functionally Indistinguishable From Mennuti.

The facts in *Mennuti* itself included that one of the two dwellings involved was used as rental property not occupied by the owner. 639 F.2d at 109, n.1, par. 6. Thus, the Seventh Circuit's purported distinction between Russell's case and *Mennuti,* on the basis that, "At the time of the incident in question, Russell lived in neither unit of the . . . property," (App. A, p. 3), is revealed as spurious. The defendant in *Mennuti* did not live in the pertinent property either, but rented it to a tenant, as did defendant. (Tr. 98-100, 104-05) See *Mennuti,* 639 F.2d at 109 n.1.

Both in deciding that on the facts, the building in this case is not "purely residential" as was the building in *Mennuti,* and in adopting the position that use of interstate natural gas to heat the building is grounds for federal jurisdiction,[7] the Seventh Circuit's opinion directly conflicts with *Mennuti*—despite the Court's self-serving disavowal (App. A, p. 3) that any conflict exists.

Congressional Intent

The legislative history of sec. 844(i) contains the telling language:

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[7] The Seventh Circuit here, (App. A, p. 2), expressly adopted the District Court's position respecting the natural gas issue. See *United States* v. *Russell,* 563 F.Supp. 1085, 1086 (N.D. Ill. 1983).

> "[T]his is a very broad provision covering substantially all *business* property." [1970] U.S. Code Cong & Adm News 4007, at 4046, House Report No. 91-1549, Organized Crime Control Act of 1970, quoted in *Mennuti, supra,* 639 F.2d at 111. (Emphasis added.)

Describing "business property," the Congressional Committee referred to:

> "the type of conduct punished by the statute [18 U.S.C. 844(i)], namely, the damage or destruction by explosion of *business property used in . . . commerce or in an activity affecting such commerce, not to dwelling houses which were not being used for any commercial purpose* at all." *Id.,* in 639 F.2d at 111-12.

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Considering all the foregoing—including the legislative history as noted above—this Court should establish and confirm, as the law of the land, the principle set forth by Judge Friendly in his well-reasoned *Mennuti* opinion, speaking for the Second Circuit in a position subsequently followed in *Barton* and *Giordano,* all *supra:*

> "We are not holding that Congress could not, with appropriate findings and language, make it a federal crime to do what appellees were charged with doing here. We hold only that Congress did not choose, as the Government contends, to make nearly every bombing in the country a federal offense; it limited its reach to property currently used in commerce or in an activity affecting it, leaving other cases to enforcement by the states." *Mennuti, supra,* 639 F.2d at 113.

Certiorari should be allowed so that this Court may resolve the clear conflict between the Seventh and Second Circuits created by the instant decision. And, on the merits, the position of the Second Circuit should be adopted as the proper interpretation of the statute, 18 U.S.C. 844(i).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-2580

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT RUSSELL,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 83 CR 114—Susan Getzendanner, *Judge.*

ARGUED MARCH 26, 1984—DECIDED JUNE 27, 1984

Before BAUER, WOOD, and ESCHBACH, *Circuit Judges.*

BAUER, *Circuit Judge.* A federal grant [sic] jury indicted Defendant Robert Russell for attempting to damage and destroy by fire or explosive, in violation of 18 U.S.C. § 844(i) (1982),[1] a two-unit apartment building at

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[1] 18 U.S.C. § 844(i) (1982) states in relevant part:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce will be imprisoned for not more than ten years or fined not more than $10,000.00, or both . . . .

4530 South Union Street, Chicago, Illinois. The district court denied Russell's motion to dismiss for lack of federal jurisdiction. 563 F. Supp. 1085 (N.D. Ill. 1983). The defendant was tried by a jury, convicted, and sentenced to ten years imprisonment. The defendant appeals on the grounds that the court lacked jurisdiction, that the evidence was insufficient to support his conviction, and that his sentence was improper. We affirm on each issue.

The district court held that the South Union Street property was within the ambit of Section 844(i) because "the creation of heat from natural gas originating out of state is an 'activity affecting interstate or foreign commerce.'" 563 F. Supp. at 1086. The defendant claims that the district court lacked jurisdiction because the building that he was accused of attempting to damage was residential property and Section 844(i) is inapplicable to residential buildings. The defendant relies principally on *United States* v. *Mennuti*, 639 F.2d 107 (2d Cir. 1981), to support his contention. In *Mennuti*, the trial court dismissed an indictment which charged the defendant with the destruction of two single-family residences. The Second Circuit affirmed the dismissal, stating that the legislative history of Section 844(i) revealed that the section does not apply to "dwelling houses which were not being used for any commercial purpose at all." 639 F.2d at 111. The district court in the case at hand held that although the South Union Street property was used as a residential property the court had jurisdiction under Section 844(i) because of the "expansive interpretations of the language of § 844(i)" that this court used in *United States* v. *Sweet*, 548 F.2d 198 (7th Cir.), *cert. denied*, 430 U.S. 969 (1977). The district court expressly refused to apply *Mennuti* because it did "not announc[e] the law of this circuit." 563 F.Supp. at 1087.

We agree with the district court that *Sweet* sanctions an expansive reading of Section 844(i). In *Sweet*, the defendant was a tavern owner convicted under Section 844(i) for his role in the fire-bombing of a competing tavern. The fire destroyed the physical structure of the

tavern and its stock of liquor and beer that had originated out of state but had been purchased locally through distributors. The defendant in *Sweet* argued that the tavern was not being used in an activity affecting interstate commerce. This court affirmed jurisdiction and concluded that "[t]he punishment in § 844(i) of the unlawful use of explosives in an interstate activity, but which has an effect on interstate commerce although *de minimis,* is within the power of Congress to enact as an appropriate means to accomplish a legitimate end under the commerce power." 548 F.2d at 202.

We do not think that it is necessary in this case, however, to reject the more restrictive interpretation of Section 844(i) in *Mennuti,* and thus create a conflict with the Second Circuit, in order to uphold the district court's jurisdiction. The district court also stated that even "when conceding the propriety of the suggested limitations [imposed by *Mennuti*] . . . , [f]rom the perspective of the defendant, the building on South Union Street was very definitely 'business property' within the meaning of [Section 844(i) and its legislative history]." 563 F. Supp. at 1088. The facts in this case amply support this finding. The South Union Street apartment building was one of four pieces of property that Russell owned and rented to tenants. Russell's income tax returns from 1976 through 1982 demonstrated that Russell treated these properties as income property for which he claimed business deductions for depreciation and expenses. These properties also were covered by business fire insurance policies, in contrast to the defendant's own residence which he covered by a homeowner's policy limited to owner-occupied premises. At the time of the incident in question, Russell lived in neither unit of the South Union Street property. The district court's jurisdiction thus could be based on the fact that this property was business or commercial property under Section 844(i), and we affirm the court's jurisdiction on this basis.

Russell next contends that the evidence at trial was insufficient to establish beyond a reasonable doubt the

attempt element of the crime. This argument is without merit. The record is replete with evidence on which a jury could find that the defendant did some act in an effort to bring about or accomplish a violation of Section 844(i). We think that it is unnecessary to review all of those facts here.

Russell's final argument is that the district court abused its discretion when it sentenced him by refusing to refer the defendant first for a psychiatric evaluation. This argument is based primarily on the defendant's contention that his conduct in this case "may well have been influenced by [a] tragic early experience"—a fire which killed two of Russell's siblings when he was only six years old. Appellant's br. at 24 n.17. The trial court is given wide discretion in determining to what length it will delve into the defendant's past to arrive at the appropriate sentence. *See United States* v. *Brubaker*, 663 F.2d 764, 768 (7th Cir. 1981). The court is not required to consider every "possibly relevant" factor, as Russell contends it should, when making a sentencing determination. It is enough for the court to consider sufficient information "to enable it to exercise its sentencing discretion in an enlightened manner," *United States* v. *Stephens*, 696 F.2d 534, 537 (11th Cir. 1983). The record reveals that the district court ably did so in this case.

For the above reasons, the defendant's conviction and sentence are affirmed.

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 25, 1984.

Before

Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Jesse E. Eschbach, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 83-2580 vs.

ROBERT RUSSELL,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 CR 114
Susan Getzendanner, Judge.

ORDER

The court hereby orders that the opinion published in the above-entitled cause on June 27, 1984, be amended as follows:

(1) On page 2, line 4, strike the words "by a jury."

(2) On page 4, line 2, change "jury" to "trier of fact."

Further, in consideration of the petition for rehearing filed in the above-entitled cause by Defendant-Appellant Robert Russell, all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the petition for rehearing be, and the same is hereby, DENIED.